



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2022-0884; FRL-10395-01-OGC]

Proposed Consent Decree, Clean Water Act and Administrative Procedure Act Claims

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's March 18, 2022, memorandum regarding "Consent Decrees and Settlement Agreements to resolve Environmental Claims Against the Agency," notice is hereby given of a proposed consent decree in *Environmental Law & Policy Center, et al., v. United States Environmental Protection Agency*, No. 3:19-cv-295 (N.D. Ohio). On February 7, 2019, the Environmental Law & Policy Center, which was later joined by the Lucas County Board of Commissioners, (collectively "Plaintiffs") filed a complaint against the EPA alleging that the Agency's approval of Ohio's 2018 section 303(d) list was arbitrary and capricious under the Administrative Procedure Act (APA) and that EPA had failed to perform duties mandated by the Clean Water Act ("CWA") with respect to Ohio's obligation to develop a Total Maximum Daily Load ("TMDL") to address nutrient pollution in western Lake Erie. EPA seeks public input on a proposed consent decree prior to its final decision-making to settle the litigation.

DATES: Written comments on the proposed consent decree must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OGC-2022-0884 online at <https://www.regulations.gov> (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action.

Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments, see the

“Additional Information About Commenting on the Proposed Consent Decree” heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas Glazer, Water Law Office, Office of General Counsel, U.S. Environmental Protection Agency; telephone: (202) 564-0908; email address: glazer.thomas@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

EPA approved Ohio’s 2018 CWA section 303(d) list on July 9, 2018. The Environmental Law & Policy Center filed a complaint on February 7, 2019, challenging that approval as arbitrary and capricious on grounds alleging that the list did not give western Lake Erie a high enough priority for TMDL development. The complaint also alleged that Ohio constructively submitted no TMDL for Lake Erie, thereby triggering a mandatory duty by EPA to act. On June 21, 2019, the Court consolidated the complaint with another similar complaint from the Board of Lucas County Commissioners.

On February 13, 2020, Ohio initiated a public comment period on its draft 2020 303(d) list, which announced that it was making western Lake Erie a high priority for TMDL development and that the State would develop a TMDL addressing multiple segments of western Lake Erie impaired by nutrient pollution and algae for submission to EPA within the following 2-3 years. Following the public comment period, the State submitted its 2020 303(d) list to EPA, which approved the list on May 29, 2020, and since that time, the State has been developing the TMDL. See <https://epa.ohio.gov/divisions-and-offices/surface-water/reports-data/maumee-river-watershed>.

In the litigation, the parties completed summary judgment briefing in May 2020 and participated in oral argument on July 24 & July 30, 2020. Following oral argument, the parties initiated settlement discussions, which ultimately produced the proposed consent decree. The State is a party to the proposed consent decree and has agreed to intervene in the case so that it

would be bound by its terms.

EPA and Ohio would each have obligations under the consent decree that work to create a binding schedule for the development of a TMDL to address the nutrient and algae impairments in western Lake Erie. The consent decree's schedule is based on the State's current projected timeline for completing the TMDL work it began in 2020. Under the decree, Ohio would be required to public notice a draft TMDL by December 31, 2022, with submission of a final TMDL to EPA to follow by June 30, 2023. EPA's obligations under the consent decree would be contingent upon Ohio's actions. If Ohio does not submit a final TMDL by June 30, 2023, and the deadline is not extended by the Court, EPA would be required to develop the TMDL within six months. The proposed consent decree also provides that if EPA disapproves the TMDL submission, Plaintiffs would not object to EPA taking up to six months to develop its own TMDL. Any of these deadlines may be extended by the Court on written finding of good cause.

For a period of thirty (30) days following the date of publication of this notice, EPA will accept written comments relating to the proposed consent decree from persons who are not parties to the litigation. EPA also may hold a public hearing on whether to enter into the proposed consent decree. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments received disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Clean Water Act or Administrative Procedure Act.

II. Additional Information About Commenting on the Proposed Consent Decree.

A. How can I get a copy of the proposed consent decree?

The official public docket for this action (identified by Docket ID No. EPA-HQ-OGC-2022-0884) contains a copy of the Proposed Order. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket

Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

The electronic version of the public docket for this action contains a copy of the Proposed Order and is available through <https://www.regulations.gov>. You may use <https://www.regulations.gov> to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select “search.”

B. How and to whom do I submit comments?

Submit your comments, identified by Docket ID No. EPA-HQ-OGC-2022-0884 via <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment.

This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the <https://www.regulations.gov> website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an “anonymous access” system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

Steven Neugeboren,

Associate General Counsel.

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